

The claimant alleged he suffered a series of repetitive injuries to his neck and left shoulder during the time period from August 2002 through November 18, 2003. The Administrative Law Judge (ALJ) found claimant failed to sustain his burden of proof that his neck and left shoulder injuries arose out of and in the course of employment; that claimant failed to provide timely notice; and, that claimant failed to provide timely written claim.

The claimant requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment with the respondent; (2) whether claimant provided timely notice and written claim; and, (3) nature and extent of disability. Claimant argues that his neck and left shoulder injuries arose out of and in the course of employment. Claimant further argues that he told his employer that his left shoulder was bothering him and later provided his employer with a written claim for compensation. Consequently, claimant argues he is entitled to compensation based upon his functional impairment.

Respondent argues the ALJ's Award should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award sets out findings of fact that are detailed, accurate, and supported by the record. The Board further finds that it is not necessary to repeat those findings of fact in this order. Therefore, the Board adopts the ALJ's findings of fact as its own as if specifically set forth herein.

In summary, the claimant had suffered two separate work-related injuries to his right shoulder and neck while working for the respondent. After the first injury claimant had arthroscopic surgery performed on his right shoulder as well as a right carpal tunnel release. After the second injury claimant had repeat surgery on his right shoulder. Claimant ultimately returned to his job as a welder for respondent in August 2002.

Claimant alleged that when he returned to work he began using his left upper extremity more while working because of the injuries to his right upper extremity. He further alleged that as he began having problems with his left shoulder he reported to Dennis Johnson, respondent's president and general manager, that work was causing pain in his left shoulder and into his neck. And that Mr. Johnson had him fill out a written claim for compensation.

Mr. Johnson denied that claimant reported a work-related injury to his left shoulder and neck. He further denied that claimant gave him a written claim for compensation for those alleged injuries. And claimant never requested medical treatment. But Mr. Johnson agreed that claimant had filled out accident reports for his two right shoulder injuries and had been provided treatment and job accommodation after those injuries.

Claimant continued working for respondent until November 18, 2003, when his employment with respondent ended. Claimant testified that he did not know why his employment was terminated. Conversely, Mr. Johnson testified that he had confronted

claimant about discrepancies in the hours he actually worked whereupon claimant became angry and quit his job. Claimant then filed for unemployment benefits alleging he had been physically assaulted by his employer and had not quit his job. Respondent provided surveillance video tapes that demonstrated claimant had quit his job and there had been no physical assault as he had alleged. The use of surveillance cameras, of which claimant was unaware, had also revealed various activities that had led respondent to terminate claimant's employment.

On December 2, 2003, claimant settled his two pending workers compensation claims against respondent. Claimant then went to work for a pig farrowing operation in April 2004 and filed the instant claim against respondent on May 26, 2004.

Initially, it must be determined whether claimant provided timely notice of the alleged injury to his left shoulder and neck. K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant testified that he told Mr. Johnson that he was having problems with his left shoulder extending into his neck as a result of his work activities. Mr. Johnson denied claimant told him of left shoulder and neck pain caused by work. As noted by the ALJ, resolution of this issue depends upon the credibility of the parties. The ALJ analyzed the evidence in the following fashion:

As with the previous issue, resolution of this issue depends upon Claimant's credibility. Claimant contends that he gave notice; Respondent denies that notice was given. Claimant demonstrated a capacity and willingness to mischaracterize the circumstances of his separation from his employment with Respondent. Respondent was fortunate to have surveillance video tapes to buttress its version and call into question Claimant's veracity. Again, Claimant was represented by counsel at all times, and had two other claims pending for injuries to the right

shoulder. Even a letter from his counsel advising of a left shoulder injury and requesting treatment would have satisfied the notice requirement, but the first contact with Claimant's attorney relative to a left shoulder claim did not occur until, at the earliest, when the claim was docketed on May 26, 2004, 189 days after Claimant's last day worked on November 18, 2003. While there is mention at the settlement hearing on December 2, 2003 of a possible claim arising after CGU Hawkeye's coverage ended on August 1, 2001, the particulars of those allegation do not appear in the record, and the record thus does not establish that those claims relate to Claimant's left shoulder, or the manner in which those claims arose. Claimant has failed to sustain his burden of proof of having given timely notice of claimed injuries to his left shoulder.¹

The Board agrees and affirms the determination that claimant failed to meet his burden of proof that he provided respondent timely notice of his alleged left shoulder and neck injuries.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 29, 2007, finding claimant failed to provide timely notice is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant

¹ ALJ Award (Nov. 29, 2007) at 11.

Samantha Benjamin-House, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge